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Paper No. 11
LKM

9/26/00

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Wings and Rings Inc.

Serial No. 75/445,612

Charles E. Baxley of Hart, Baxley, Daniels & Holton for
applicant.

Robert L. Lorenzo, Trademark Examining Attorney, Law Office 111
(Craig Taylor, Managing Attorney).

Before Simms, Bucher and McLeod, Administrative Trademark
Judges.

Opinion by McLeod, Administrative Trademark Judge:

An application has been filed by Wings and Rings, Inc. to
register BEST WINGS USA for "cooked poultry."¹

The Examining Attorney issued a final refusal of
registration under Section 2(e)(2) of the Trademark Act, 15
U.S.C. §1052(e)(2), on the ground that the proposed mark is
primarily geographically descriptive of the goods, and under

¹ Application Serial No. 75/445,612, filed March 5, 1998, under
Section 1(b), 15 U.S.C. §1051(b). The term "WINGS" is disclaimed
apart from the mark as shown. The Board is aware of applicant's
related Application Serial No. 75/445,927 for the mark BEST WINGS USA
for "restaurant services." A separate decision has been issued in
that case.

Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that applicant's mark, when applied to the identified goods, so resembles the previously registered mark shown below for "restaurant services"² as to be likely to cause confusion.



When the refusal was made final, applicant appealed. Applicant and the Examining Attorney have filed briefs. An oral hearing was not requested.

Turning first to the refusal of registration under Section 2(d), applicant argues that confusion is unlikely because the overall commercial impression, sound and appearance of the involved marks are dissimilar. Applicant acknowledges that both marks contain the words BEST and WINGS. According to applicant, however, BEST is laudatory and BEST WINGS is suggestive in both marks. Applicant submits that the cited mark BEST WINGS IN THE WORLD and design is entitled to a narrow scope of protection. Applicant claims, among other things, that the term USA in applicant's mark and the phrase IN THE WORLD in the cited registration conjure up different, contrasting commercial

² Registration No. 1,805,650, issued November 16, 1993, on the Supplemental Register, setting forth dates of first use of February 24, 1993. Section 8 affidavit accepted.

messages. Also, applicant argues that there have been no instances of actual confusion and that there are many similar marks used by others. Applicant has not submitted any evidence in support of its position.

The Examining Attorney, on the other hand, contends that the involved marks are similar in overall impression and meaning. The Examining Attorney maintains, among other things, that both marks contain the words BEST WINGS, and thus both refer to chicken wings or "buffalo" wings. The only difference between the marks, according to the Examining Attorney, is the geographically descriptive term USA in applicant's mark and IN THE WORLD in registrant's mark. The Examining Attorney submits, however, that these terms are nevertheless both geographic. According to the Examining Attorney, the design element in the registered mark is negligible and does not minimize the word portion of the mark. In support of his position, the Examining Attorney relies upon dictionary definitions and articles from the NEXIS computer database to show that restaurants serve "chicken wings."³

In determining whether there is likelihood of confusion between two marks, we must consider all relevant factors as set

³ While the dictionary evidence was not submitted prior to appeal, the Board may take judicial notice of dictionary definitions. See Trademark Rule 2.142(d); *University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co., Inc.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

forth in *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In any likelihood of confusion analysis under Section 2(d), two of the most important considerations are the similarities or dissimilarities between the marks and the similarities or dissimilarities between the goods and services. *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976); and *In re Azteca Restaurant Enterprises, Inc.*, 50 USPQ2d 1209 (TTAB 1999) and the cases cited therein. Because applicant and the Examining Attorney have focused on these two factors, we have done the same.

Applicant does not seriously dispute the fact that the applicant's goods are related to the registrant's services. Indeed, applicant itself has filed separate applications seeking registration of BEST WINGS USA for "cooked poultry" and "restaurant services." The Examining Attorney has, at any rate, established that the goods and services are related for purposes of finding a likelihood of confusion. In particular, the Examining Attorney's NEXIS evidence demonstrates that restaurants, like the applicant and registrant's respective establishments, serve cooked poultry items (including chicken and "buffalo" wings).

We turn, next, to a determination of whether applicant's mark and the registered mark, when viewed in their entirety are similar in terms of appearance, sound, connotation and

commercial impression. The test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impressions that confusion as to the source of the goods or services offered under the respective marks is likely to result. The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. See *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975). Furthermore, although the marks at issue must be considered in their entirety, it is well settled that one feature of a mark may be more significant than another, and it is not improper to give more weight to this dominant feature in determining the commercial impression created by the mark. See *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985).

In comparing applicant's BEST WINGS USA to the cited BEST WINGS IN THE WORLD and design, in their entirety, we recognize that the marks are not identical in sound, appearance, connotation or commercial impression. However, we find that the marks are sufficiently similar overall that consumers are likely to be confused. Both marks contain the wording BEST WINGS as the first and most dominant portion of the respective marks. These words have the same appearance and sound. We also agree with the Examining Attorney that BEST WINGS presents the same

connotation in both marks, namely, that the parties' offer the "best" chicken or "buffalo" wings. Furthermore, both marks end with a geographical term (USA and IN THE WORLD) which, in our opinion, does not distinguish the overall commercial impression of the marks, but rather emphasizes the overall similarities between them.⁴ In our view, consumers encountering applicant's BEST WINGS USA on "cooked poultry" are likely to believe that applicant's products originate with or are associated with the registrant's BEST WINGS IN THE WORLD "restaurant services."

With respect to applicant's contention that there are numerous third-party uses of similar marks or that there have been no instances of actual confusion, applicant has failed to present any supporting evidence. Consequently, these arguments have been given no consideration. *AMF Inc. v. American Leisure Products, Inc.*, 474 F.2d 1403, 1406, 177 USPQ 268, 269 (CCPA 1973); *In re Hub Distributing, Inc.*, 218 USPQ 284 (TTAB 1983).

To the extent applicant contends that the cited registration is entitled to a narrow scope of protection because it is on the Supplemental Register, we would point out that even

⁴ Applicant did not specifically address the "design" feature of the cited mark. Nonetheless, we agree with the Examining Attorney that the stylized presentation of the word "WINGS" does not serve to distinguish the marks as a whole.

weak marks are entitled to some measure of protection. This is particularly true in the case of an applicant seeking to register a similar mark for related goods and services. See *In re Clorox Co.*, 578 F.2d 305, 198 USPQ 337, 340-41 (CCPA 1978).

With respect to the Examining Attorney's refusal of registration under Section 2(e)(2), we note that applicant failed to address this ground of refusal in its initial appeal brief. We view applicant's failure to respond on the merits to the Examining Attorney's final refusal under Section 2(e)(2) as a concession of the matter in question. See *In re Big Daddy's Lounges Inc.*, 200 USPQ 371, 373 n. 3 (TTAB 1978). We hasten to add, however, that even if we considered this issue on brief, we would nevertheless affirm the refusal of registration under Section 2(e)(2) for the reasons set forth in the Examining Attorney's appeal brief.

Decision: The refusals to register are affirmed.

R. L. Simms

D. E. Bucher

L. K. McLeod
Administrative Trademark
Judges, Trademark
Trial and Appeal Board

Ser No. 75/445,612